



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

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MEMORANDUM

May 2, 2007

TO: The Commission

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AGENDA ITEM
For Meeting of: 05-03-07

SUBMITTED LATE

SUBJECT: Draft Notice of Proposed Rulemaking for Hybrid Communications

Attached is a draft Notice of Proposed Rulemaking for Hybrid Communications.

The draft proposed rule would revise 11 CFR 106.8 to attribute disbursements for certain public communications made by a political party that refer to one or more clearly identified Federal candidates and also refer to other candidates of a political party without clearly identifying them. The attached draft contains alternative provisions for certain provisions of the proposed rule.

We request that this draft be placed on the agenda for May 3, 2007.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 106**

3 **[Notice 2007->>]**

4 **Hybrid Communications**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Notice of Proposed Rulemaking.

7 **SUMMARY:** The Federal Election Commission requests comments on a
8 proposed rule to attribute the disbursements for a public
9 communication made by a political party that refers to a clearly
10 identified Federal candidate and that also generically refers to
11 other candidates of a political party without clearly identifying
12 them. Several alternatives are presented, including an alternative
13 to include public communications that refer to multiple Federal
14 candidates. The Commission has made no final decision on the
15 issues presented in this rulemaking. Further information is
16 provided in the supplementary information that follows.

17 **DATES:** Comments must be received on or before [INSERT DATE 30
18 DAYS AFTER THE DATE OF PUBLICATION IN THE
19 FEDERAL REGISTER]. The Commission will hold a hearing on
20 the proposed rules on July 11, 2007 at 10:00 a.m. Anyone wishing
21 to testify at the hearing must file written comments by the due date
22 and must include a request to testify in the written comments.

23

1 **ADDRESSES:** All comments must be in writing, must be addressed to Ms. Amy
2 L. Rothstein, Assistant General Counsel, and must be submitted in
3 either e-mail, facsimile, or paper copy form. Commenters are
4 strongly encouraged to submit comments by e-mail to ensure
5 timely receipt and consideration. E-mail comments must be sent to
6 either hybridads@fec.gov or submitted through the Federal
7 eRegulations Portal at <www.regulations.gov>. If e-mail
8 comments include an attachment, the attachment must be in either
9 Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed
10 comments must be sent to (202) 219-3923, with paper copy
11 follow-up. Paper comments and paper copy follow-up of faxed
12 comments must be sent to the Federal Election Commission, 999 E
13 Street, NW, Washington, DC 20463. All comments must include
14 the full name and postal service address of the commenter or they
15 will not be considered. The Commission will post comments on its
16 website after the comment period ends. The hearing will be held
17 in the Commission’s ninth-floor meeting room, 999 E Street, NW,
18 Washington, DC.

19 **FOR FURTHER**
20 **INFORMATION**
21 **CONTACT:**

 Ms. Amy L. Rothstein, Assistant General Counsel, Ms. Esa L.
22 Sferra, Attorney, or Mr. Robert M. Knop, Attorney, 999 E Street,
23 NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

24

1 **SUPPLEMENTARY**
2 **INFORMATION:**

3 Through this rulemaking, the Commission seeks to establish how political party
4 committees attribute disbursements for “hybrid communications” – communications that
5 refer both to one or more clearly identified Federal candidates and generically to
6 candidates of a political party (“generic party reference”).

7 The Federal Election Campaign Act of 1971, as amended (“the Act”), and current
8 Commission regulations do not explicitly provide for the attribution of disbursements for
9 hybrid communications, except for those communications distributed by means of a
10 telephone bank. See 11 CFR 106.8 (requiring disbursements to be attributed equally
11 between the Federal candidate clearly identified in the communication and the political
12 party committee making the communication). Recently, the Commission considered the
13 attribution of disbursements for hybrid communications made by a political party
14 committee through two other types of public communication: hybrid communications by
15 means of mass mailings and hybrid communications by means of broadcast television
16 and radio. See Advisory Opinion 2006-11 (Washington Democratic State Central
17 Committee) (mass mailings);¹ Report of the Audit Division on Bush-Cheney ’04, Inc. and
18 the Bush-Cheney ’04 Compliance Committee, Inc. (approved March 22, 2007) (“Final
19 Audit Report”) (television and radio advertisements).² The proposed rule discussed
20 below presents alternative methods for attributing the disbursements for various forms of
21 hybrid communications made by political party committees, and would supersede and
22 replace current 11 CFR 106.8.

23 **I. Background**

¹ Available at www.fec.gov/law/law.shtml

² Available at www.fec.gov/audits/audit_reports_pres.shtml

1 The general rule for attributing disbursements for a communication made on
2 behalf of more than one Federal candidate clearly identified in the communication is
3 based on the “benefit reasonably expected to be derived” by the candidates. See 11 CFR
4 106.1(a). Under section 106.1(a), that benefit is determined by the proportion of space or
5 time, or number of questions or statements, devoted to each clearly identified Federal
6 candidate as compared to the total space or time, or number of questions or statements,
7 devoted to all clearly identified Federal candidates. The percentage reflecting the relative
8 proportion of space or time devoted to a clearly identified Federal candidate is the
9 percentage of the disbursements for the communication attributed to that candidate
10 (“space or time attribution”). The terms of this rule are limited to communications that
11 refer to two or more clearly identified Federal candidates, and do not provide a method
12 for a political party to attribute a portion of the communication to itself, through a generic
13 party reference.

14 Current section 106.8 does permit attribution of the benefit reasonably expected to
15 be derived from a generic party reference in hybrid communications made by a political
16 party, but only when the communication is made by means of a telephone bank. See 11
17 CFR 106.8; Final Rules and Explanation and Justification for Party Committee
18 Telephone Banks, 68 FR 64517 (Nov. 14, 2003) (“Telephone Bank Final Rules”).
19 Currently, section 106.8 requires disbursements for the communication to be attributed
20 equally to the clearly identified Federal candidate and the political party making the
21 communication.

22 Recently, the Commission was asked to address the attribution of disbursements
23 for a hybrid communication by means of a mass mailing paid for by a State committee of

1 a political party. In Advisory Opinion 2006-11 (Washington Democratic State Central
2 Committee), the Commission noted that “[n]either the Act nor Commission regulations
3 definitively address the appropriate allocation of payments for” a mass mailing that
4 referred to one clearly identified Federal candidate and contained a generic party
5 reference. Advisory Opinion 2006-11. “Section 106.1(a) provides the general rule that
6 expenditures made on behalf of *more than one* clearly identified candidate ‘shall be
7 attributed to each such candidate according to the benefit reasonably expected to be
8 derived.’” *Id.* “Commission regulations at 11 CFR 106.8 (which apply only to *phone*
9 *banks* conducted by a party committee) do address the attribution required for a
10 communication that possesses the same attributes as the mass mailings described in [the]
11 request (*i.e.*, reference to only one clearly identified Federal candidate along with a
12 generic reference to other party candidates; and no solicitation of funds).” *Id.* The
13 Commission nonetheless concluded that at least 50 percent of the disbursements should
14 be attributed to the clearly identified Federal candidate. If the space devoted to that
15 Federal candidate exceeds the amount of space devoted to the generic party reference, the
16 disbursement must be attributed to the Federal candidate based on an analysis of the
17 space or time devoted to the Federal candidate, as compared to the space or time devoted
18 to the generic party reference, pursuant to guidance in 11 CFR 106.1(a).

19 Most recently, the Commission was presented with the issue of attributing
20 disbursements for hybrid communications by means of broadcast television and radio
21 paid for in part by a publicly funded presidential candidate and in part by a national
22 committee of a political party. See Final Audit Report. The national committee
23 attributed 50 percent of the disbursements for the hybrid communications to its publicly

1 funded presidential candidate clearly identified in the communications, and 50 percent to
2 the political party committee. In the Final Audit Report, the Commission considered the
3 extent to which, if any, 11 CFR 106.1 and 106.8 provided guidance for attributing the
4 disbursements for the communications, but did not make a finding.³ Id.

5 The Commission is proposing to amend current 11 CFR 106.8 to address the
6 attribution of disbursements for hybrid communications made through all types of
7 “public communication” as defined in 11 CFR 100.26. Proposed section 106.8 would be
8 divided into paragraph (a) setting out the scope of the proposed rule, paragraph (b) setting
9 out the attribution formulas, and paragraph (c) describing the reporting of disbursements
10 attributed under the proposed rule. The discussion below explains each paragraph
11 separately and also seeks comment on the proposed rule.

12 **II. Proposed 11 CFR 106.8(a) – Scope**

13 Proposed 11 CFR 106.8 would apply to any “public communication,” as defined
14 in 11 CFR 100.26, which includes broadcast, cable, and satellite communications;
15 newspapers and magazines; outdoor advertising facilities; mass mailings; telephone
16 banks; and Internet communications placed for a fee on another person’s website. See 2
17 U.S.C. 431(22); 11 CFR 100.26. Proposed 11 CFR 106.8 would address the attribution
18 of disbursements for a public communication made by any national, State, district, or
19 local party committee, including national congressional campaign committees and
20 convention committees, see 11 CFR 9008.3(a)(2), that contains a generic party reference
21 and also refers to only one clearly identified Federal candidate, such as “Show your
22 support for Senator X and our other great Democratic candidates.” As discussed below,
23 proposed 11 CFR 106.8 would also address the attribution of disbursements for a public

³ Statements of Reasons issued by Commissioners on the Final Audit Report are available at www.fec.gov.

1 communication that refers to two or more clearly identified Federal candidates, provided
2 that those candidates are running for the same Federal office.⁴ An additional proposed
3 alternative would further address the attribution of disbursements for a public
4 communication that refers to two or more clearly identified Federal candidates running
5 for different Federal offices. Neither the proposed rule nor any of the alternatives
6 presented would apply to disbursements for public communications that are independent
7 expenditures.

8 The Commission seeks comment on all aspects of the scope of proposed 11 CFR
9 106.8. Should the Commission apply a uniform attribution rule to all types of public
10 communication? In 2003, the Commission “decided to limit the scope of new section
11 106.8 to phone banks . . . because each type of communication presents different issues
12 that need to be considered in further detail before establishing new rules.” Telephone
13 Bank Final Rules, 68 FR at 64518. Are there communication-specific considerations that
14 counsel against adoption of a uniform approach?

15 A. Proposed 11 CFR 106.8(a)(1)(i) and (ii) – Reference to a clearly identified
16 Federal candidate

17 1. Proposed 11 CFR 106.8(a)(1)(i)(A) and (B)

18 The proposed rule would extend to two types of public communications. The first
19 type refers to only one clearly identified Federal candidate and does not refer to any other
20 clearly identified Federal or non-Federal candidate. The clearly identified Federal

⁴ For purposes of this section, the Commission would consider a reference to a clearly identified presidential and vice presidential candidate of the same political party as a reference to one clearly identified candidate.

1 candidate could be either a candidate of the political party making the communication, or
2 an opposing candidate. The Commission requests comment on this approach.

3 The second type of public communication covered by the proposed rule refers to
4 two or more clearly identified Federal candidates running for the same Federal office,
5 only one of whom is a candidate of the political party making the public communication,
6 provided the communication does not clearly identify any other Federal or non-Federal
7 candidate. This portion of the proposed rule is intended to reach communications that
8 compare or contrast the political party's own clearly identified Federal candidate with
9 other clearly identified candidates not supported by the political party. The Commission
10 requests comment on this approach.

11 For purposes of the proposed rule, a Federal candidate of a political party would
12 include both a Federal candidate seeking the nomination of that political party and a
13 candidate who has already obtained that political party's nomination.

14 2. Proposed Alternative 11 CFR 106.8(a)(1)(i)(C) – Multiple Federal
15 Candidate Reference

16 Proposed 11 CFR 106.8(a)(1)(i)(C) would extend the rule to a third type of public
17 communication, namely a public communication that refers to multiple clearly identified
18 Federal candidates of the same political party who are seeking different Federal offices.
19 This portion of the proposed rule is intended to reach communications that promote a
20 “slate” of a political party's candidates, along with the party itself. For example,
21 proposed 11 CFR 106.8(a)(1)(C) would permit attribution of a public communication that
22 refers to a political party's candidates for both U.S. Senate and U.S. House.

1 The Commission seeks comment on this approach. Are such communications
2 quantitatively different from communications clearly identifying Federal candidates for
3 the same Federal office only? Is the value of the generic party reference in a hybrid
4 communication diluted by the inclusion of more clearly identified candidates? The
5 Commission seeks comments on such an approach and possible methods for attributing
6 disbursements for a communication clearly identifying multiple Federal candidates of the
7 same political party seeking different Federal offices between those candidates and the
8 political party making the communication. If the Commission were to adopt this
9 approach, should it exclude public communications that include a reference to a clearly
10 identified non-Federal candidate? What would be the consequences of including such a
11 reference?

12 B. Proposed 11 CFR 106.8(a)(1)(iii) – Generic party reference

13 Proposed 11 CFR 106.8(a)(1)(iii) would define a generic party reference in a
14 public communication as a reference to other Federal or non-Federal candidates that does
15 not clearly identify those candidates.

16 The proposed rule presents two alternative descriptions of a generic party
17 reference. The first alternative would require the generic party reference to refer to the
18 other candidates as candidates of a political party by using the name or nickname of the
19 political party, such as “our wonderful Democratic team,” or “the great Republican
20 ticket.” The Commission seeks comment on this proposed alternative. Under this
21 approach, the generic reference must refer to candidates of a political party, rather than
22 simply refer to a political party. For example, in the statement “Candidate Y and the
23 Republican Party,” the reference to the Republican Party would not be a generic

1 reference to other Republican candidates and, therefore, would not be a hybrid
2 communication. Should general references to party members without reference to their
3 status as candidates, such as “the Democratic leaders” or “Republicans in Congress,” be
4 treated as generic party references under this alternative? Should an unambiguous
5 reference to a political party that does not use the political party’s formal name also be a
6 generic party reference?

7 The second proposed alternative for 11 CFR 106.8(a)(1)(iii) would retain the
8 language of current 11 CFR 106.8, which requires a generic reference to candidates
9 without clearly identifying them, but does not require the candidates to be identified as
10 candidates of a political party, or that the political party be clearly identified. The
11 Commission seeks comment on this second alternative. For example, should a reference
12 to “Liberals in Congress” or “Leaders in Congress” be treated as a generic party reference
13 under this alternative?

14 C. Proposed 11 CFR 106.8(a)(1)(iv) and (v) – Other Requirements

15 Proposed 11 CFR 106.8, like current 11 CFR 106.8, would not apply to hybrid
16 communications that solicit contributions, donations, or other funds. The Commission
17 seeks comment on whether proposed section 106.8(a)(1)(iv), containing the solicitation
18 exemption, is necessary. Should the proposed rule apply to hybrid communications
19 regardless of whether they contain a solicitation?

20 Proposed 11 CFR 106.8 would not apply to any hybrid communications where the
21 costs are otherwise exempt from the definitions of “contribution” and “expenditure”
22 under 11 CFR part 100, subpart C or E. Disbursements that do not constitute
23 “contributions” or “expenditures” under 11 CFR part 100 need not be attributed to any

1 candidate in order to determine the permissibility of contributions or to report
2 expenditures. The Commission seeks comment on this approach.

3 D. Proposed 11 CFR 106.8(a)(2) – Exclusion of certain multiple candidate hybrid
4 communications

5 Proposed 11 CFR 106.8(a)(2) would exclude from the proposed rule any hybrid
6 communication made by a political party that refers to two or more clearly identified
7 Federal candidates, other than candidates running for the same Federal office. For
8 example, a communication that states “Vote for Senate Candidate X, House Candidate Y,
9 and the rest of the great Party ticket” would not be covered by the proposed rule. The
10 proposed rule would also exclude hybrid communications that refer to one or more
11 clearly identified non-Federal candidates. These communication would remain subject to
12 attribution solely between the candidates who are clearly identified in the public
13 communication under 11 CFR 106.1(a). The Commission seeks comment on this
14 approach.

15 A proposed alternative version of 11 CFR 106.8(a)(2) would exclude from the
16 proposed rule hybrid communications that refer to multiple clearly identified Federal
17 candidates who are seeking different Federal offices, but are not candidates of the
18 political party making the communication. The proposed alternative version would also
19 exclude hybrid communications that refer to one or more clearly identified non-Federal
20 candidates. These communication would remain subject to attribution solely between the
21 candidates who are clearly identified in the public communication under 11 CFR
22 106.1(a). The Commission seeks comment on this approach.

1 Under either approach, is attribution of excluded public communications pursuant
2 to 106.1(a) appropriate? Should the Commission conclude that a generic party reference
3 benefits a political party committee in only certain prescribed circumstances?

4 E. Proposed 11 CFR 106.8(a)(3) – Exclusion of independent expenditures

5 Proposed 11 CFR 106.8(a)(3) would exclude from the proposed rule any
6 disbursement that is an independent expenditure under 11 CFR 100.16, even if such a
7 communication contains a generic party reference. Under 11 CFR 104.4 and
8 104.3(b)(3)(vii), the entire amount of such independent expenditures must be reported as
9 either in support of, or in opposition to, a particular candidate, without regard to any
10 generic reference to other candidates. Independent expenditures are not contributions to
11 any candidate. Under 11 CFR part 300, such independent expenditures must be made
12 entirely with Federal funds.

13 **III. Proposed 11 CFR 106.8(b) – Attribution**

14 Although current 11 CFR 106.8 attributes a fixed 50 percent of the disbursements
15 for a hybrid communication through a telephone bank to the Federal candidate clearly
16 identified in the communication, the Commission is revisiting both the attribution method
17 and the attribution percentage appropriate for all hybrid communications covered by the
18 proposed rule.

19 Consistent with the general rule that disbursements for a communication should
20 be attributed to a candidate based on the benefit reasonably expected to be derived by that
21 candidate, proposed 11 CFR 106.8(b) would attribute a disbursement for a hybrid
22 communication between the political party making the hybrid communication and the
23 political party's own Federal candidate.

1 Proposed 11 CFR 106.8(b) would attribute disbursements for hybrid
2 communications as follows:

- 3 • If the candidate of the political party making the communication is the
4 only clearly identified Federal candidate in the hybrid communication,
5 then the proposed rule would attribute the disbursements for the
6 communication between the clearly identified Federal candidate and the
7 political party making the communication.
- 8 • If the only clearly identified Federal candidate in the hybrid
9 communication is the opponent of the candidate of the political party
10 making the communication, then the proposed rule would attribute the
11 disbursements for the communication between the political party making
12 the communication and the candidate of that political party who is running
13 for the same Federal office as the clearly identified Federal candidate.
- 14 • If the hybrid communication clearly identifies at least two Federal
15 candidates running for the same Federal office, only one of whom is a
16 candidate of the political party making the communication, then the
17 proposed rule would attribute the disbursements for the communication
18 between the political party making the communication and the clearly
19 identified Federal candidate of that political party.

20 Additionally, under the proposed multiple Federal candidate reference alternative:

- 21 • If the hybrid communication clearly identifies at least two Federal
22 candidates of the same political party running for different Federal offices,
23 the proposed rule would attribute the disbursements for the

1 communication among the political party making the communication and
2 the clearly identified Federal candidates of that political party.

3 The Commission seeks comment on this approach. Are there data or other evidence that
4 supports a down-ticket benefit from ads that reference a clearly identified candidate and
5 also contain a generic reference?

6 Hybrid communications that are made prior to a primary election and clearly
7 identify a candidate of a political party other than the party making the communication
8 present an additional issue, because the political party making the communication could
9 have several of its own candidates seeking nomination for the same Federal office as the
10 Federal candidate clearly identified in the communication. The Commission seeks
11 comment on how the proposed rule should attribute disbursements between the political
12 party making the communication and its various candidates seeking the political party's
13 nomination for the same Federal office as the candidate clearly identified in the
14 communication.

15 Proposed 11 CFR 106.8(b) presents three alternative attribution formulas: (1) a
16 fixed percentage (proposed at 25 percent, 50 percent, or 75 percent); (2) a fixed
17 percentage of 100 percent, requiring the entire amount of each disbursement for the
18 communication to be attributed to the Federal candidate of the political party making the
19 communication; and (3) the greater of either a fixed percentage (proposed at 25 percent,
20 50 percent, or 75 percent), or a percentage based on space or time attribution. The
21 Commission seeks comment on these three alternative attribution formulas and whether a
22 single formula should apply to all hybrid communications, regardless of the office sought
23 by the Federal candidate who is clearly identified in the communication. Additionally, if

1 the Commission were to adopt the proposed multiple Federal candidate reference
2 alternative at proposed 11 CFR 106.8(a)(1)(i)(C), what attribution formula or method
3 would be most appropriate?

4 The Commission also invites comment on whether there are other factors that the
5 Commission should consider to be relevant to determining the relative benefit reasonably
6 expected to be derived from the hybrid communication by a Federal candidate and by the
7 political party making the communication. Must the hybrid communication be
8 disseminated or distributed in the jurisdiction in which the clearly identified Federal
9 candidate is running? Should different attribution percentages apply to House, Senate or
10 Presidential candidates? Should a different attribution formula apply for publicly funded
11 presidential candidates? Should a different fixed percentage apply if the clearly
12 identified Federal candidate is in a highly contested race? Should a different fixed
13 percentage apply for a presidential candidate if the hybrid communication is disseminated
14 or distributed in a battleground state? Lastly, should the percentage attributed to the
15 clearly identified Federal candidate change based on timing, i.e., the proximity to the
16 election of the hybrid communication's dissemination or distribution?

17 A. Attribution Alternative 1 – Fixed Percentage (proposed at 25% or 50% or
18 75%)

19 Attribution Alternative 1 would require a fixed percentage of the disbursements
20 for a public communication to be attributed to the Federal candidate of the political party
21 making the communication. This candidate would be either clearly identified in the
22 public communication, or (in the case of negative advertisements) a candidate for the
23 same Federal office as the only Federal candidate clearly identified in the public

1 communication. The remaining percentage of the disbursements would not be
2 attributable to any other Federal or non-Federal candidate and could be treated as
3 political party committee operating expenses.

4 Attribution Alternative 1 is based on current 11 CFR 106.8, which requires 50
5 percent of the disbursements for hybrid communications made via telephone banks to be
6 attributed to the clearly identified Federal candidate and prohibits the remaining 50
7 percent of the disbursements from being attributed to any other Federal or non-Federal
8 candidate. Attribution Alternative 1 proposes three alternative percentages: (1) 25
9 percent, (2) 50 percent, and (3) 75 percent, as discussed below.

10 The Commission seeks comment on Attribution Alternative 1, including which, if
11 any, of the three alternative percentages should be adopted, or whether a different fixed
12 percentage should be adopted. The Commission also seeks comment on whether the
13 attribution percentages should differ depending on the type of public communication or
14 on other factors. In addition to opinion and suggestion, the Commission invites the
15 submission of empirical evidence and other analysis that would justify the use of a
16 particular percentage method.

17 1. 25 Percent

18 The first alternative would require that 25 percent of the disbursements for a
19 public communication be attributed to the Federal candidate of the political party making
20 the public communication, with the remaining 75 percent of the disbursements not
21 attributed to any other Federal or non-Federal candidate. This alternative is based on the
22 proposition that the Federal candidate of the political party making the public
23 communication could reasonably expect to derive significantly less benefit from the

1 communication than the political party making the communication. The Commission
2 seeks comment on this alternative.

3 2. 50 Percent

4 The second alternative, like current 11 CFR 106.8, would require 50 percent of
5 the disbursements for a public communication to be attributed to the Federal candidate of
6 the political party making the communication, with the remaining 50 percent of the
7 disbursements not attributed to any other Federal or non-Federal candidate. This
8 alternative is based on the proposition that the Federal candidate of the political party
9 making the public communication could reasonably expect to derive roughly the same
10 benefit from the communication as the political party making the communication. The
11 Commission seeks comment on this alternative.

12 3. 75 Percent

13 Under the third alternative, 75 percent of the disbursements for a public
14 communication would be attributed to the Federal candidate of the political party making
15 the communication, and the remaining 25 percent of the disbursements would not be
16 attributable to any other Federal or non-Federal candidate. This alternative is based on the
17 proposition that the Federal candidate of the political party making the communication
18 could reasonably expect to derive the most benefit from a public communication, while
19 recognizing that a generic party reference does provide some benefit to the political party
20 making the communication. The Commission seeks comment on this alternative.

21 B. Attribution Alternative 2 – Fixed Percentage (100%)

22 Under Attribution Alternative 2, all of the disbursements for a public
23 communication would be attributed to the Federal candidate of the political party making

1 the communication. This candidate would be either clearly identified in the public
2 communication, or a candidate for the same Federal office as the only Federal candidate
3 clearly identified in the public communication. This alternative would be similar to the
4 allocation rules for separate segregated funds and nonconnected committees in 11 CFR
5 106.6(f).⁵ This alternative is based on the proposition that a generic party reference could
6 be reasonably expected to provide at most an insignificant benefit to the political party
7 making the public communication, and that the Federal candidate of the political party
8 making the communication could reasonably expect to derive all of the benefit from the
9 communication. The Commission seeks comment on Attribution Alternative 2. In 2003,
10 the Commission did not adopt a 100% candidate attribution alternative for phone bank
11 communications. Does evidence or experience indicate that the Commission should
12 reconsider this conclusion?

13 C. Attribution Alternative 3 – The greater of a fixed percentage (proposed at 25%
14 or 50% or 75%) or a space or time attribution

15 Attribution Alternative 3 would require the disbursements for a public
16 communication to be attributed to the Federal candidate of the political party making the
17 communication who is either clearly identified in the public communication or a
18 candidate for the same Federal office as the only Federal candidate clearly identified in
19 the public communication, based on either a given attribution percentage, or based on a
20 space or time attribution percentage, whichever is greater. The space or time attribution
21 percentage would be calculated as a ratio of the public communication's space or time

⁵ Under section 106.6(f), the disbursements for a public communication are allocated between Federal and non-Federal accounts based solely on the candidates clearly identified in the communication, without regard to any generic party reference. See also Final Rules and Explanation and Justification for Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 FR 68056, 68063 (Nov. 23, 2004).

1 devoted to all clearly identified Federal candidates compared to the communication's
2 space or time devoted to all clearly identified Federal candidates and all generic party
3 references. The disbursements not attributed to the Federal candidate of the political
4 party paying for the communication would not be attributed to any other Federal or non-
5 Federal candidate.

6 Attribution Alternative 3 is based on the attribution formula in Advisory Opinion
7 2006-11 (Washington Democratic State Central Committee). In Advisory Opinion 2006-
8 11, the Commission concluded that at least 50 percent of the disbursements for the mass
9 mailing must be attributed to the clearly identified Federal candidate, even if the space
10 attributable to that candidate is less than the space attributable to the generically
11 referenced candidates. However, the Commission concluded that if the amount of space
12 in the mailing devoted to the clearly identified Federal candidate exceeds the space
13 devoted to the generically referenced candidates, then the disbursements attributed to the
14 clearly identified Federal candidate must exceed 50 percent and "reflect at least the
15 relative proportion of the space devoted to that candidate," similar to the space or time
16 attribution under 11 CFR 106.1(a). Although the Commission determined that 50 percent
17 was the minimum percentage to be attributed to the clearly identified Federal candidate
18 under the facts of Advisory Opinion 2006-11, Attribution Alternative 3 presents three
19 alternative minimum percentages: (1) 25 percent, (2) 50 percent, and (3) 75 percent.

20 The Commission seeks comment on Attribution Alternative 3, including which, if
21 any, of the alternative minimum percentages should apply to all types of "public
22 communication," or whether the minimum percentage should depend on the specific type
23 of public communication. The Commission invites comment on whether a space or time

1 attribution, or some other method of attribution, is appropriate for all types of public
2 communication. The Commission also seeks comment on whether the space or time
3 devoted to a clearly identified Federal candidate in any general or “stand by your ad”
4 disclaimer required by the Act and Commission regulations should be considered when
5 calculating a space or time analysis under Attribution Alternative 3. See 2 U.S.C.
6 441d(a) and 11 CFR 110.11(a)(1), (b)(1) and (2) (general disclaimer requirement); see
7 also 2 U.S.C. 441d(d) and 11 CFR 110.11(c)(3) (the “stand-by-your-ad” provisions).

8

9 **IV. Proposed 11 CFR 106.8(c) – Treatment**

10 Proposed 11 CFR 106.8(c) would permit a political party making a hybrid
11 communication to treat disbursements attributed to a Federal candidate under proposed
12 11 CFR 106.8(b) as an in-kind contribution to that candidate subject to the limitations of
13 11 CFR 110.1 and 110.2 or a party coordinated expenditure on behalf of that candidate
14 under 11 CFR part 109, subpart D. Proposed 11 CFR 106.8(c) would also allow the
15 Federal candidate or the candidate’s authorized committee to reimburse the political party
16 for the costs attributed to the candidate. The Commission notes that such a
17 reimbursement would have to be made within a reasonable time. See, e.g., Advisory
18 Opinion 2004-37 (Waters) (reimbursement by Federal candidates’ authorized committees
19 for disbursements for a printed communication would not constitute a contribution to
20 another Federal candidate’s authorized committee if the reimbursements were made
21 within a “reasonable time”). The Commission invites comment on whether the proposed
22 rule should require prepayment of shared hybrid communication costs, or whether it

1 should include a time limit for reimbursement, such as 30 or 60 days, or some other time
2 period.

3 The Commission notes that the proposed rule would permit a hybrid
4 communication that is coordinated with a Federal candidate to be treated as a
5 combination of an in-kind contribution, a party coordinated expenditure, and/or a
6 reimbursement. The Commission seeks comment on this approach and the general
7 treatment of these disbursements under the proposed rule.

8 **V. Alternative Proposal – Amend 11 CFR 106.1**

9 As an alternative to adopting proposed 11 CFR 106.8, should the Commission
10 instead amend 11 CFR 106.1 to also include expenditures that contain generic party
11 references, and require that such expenditures be attributed (1) to each clearly identified
12 Federal candidate and political party according to the benefit each may reasonably expect
13 to derive, or (2) according to a ratio based on the number of candidates referenced,
14 including the generic party reference? For example, under the latter alternative, a
15 communication encouraging viewers to support “Senator Smith, Representative Jones,
16 and all the great candidates of the Democratic Party” would be attributed equally between
17 the three references (*i.e.*, one-third to Smith, one-third to Jones, and one-third to the
18 political party making the communication). The Commission seeks comment on all
19 aspects of this alternative.

20 **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

21 The Commission certifies that the attached proposed rule would not, if
22 promulgated, have a significant economic impact on a substantial number of small
23 entities. The basis for this certification is that any individuals and not-for-profit entities

1 that would be affected by the proposed rule are not “small entities” under 5 U.S.C. 601.
2 The definition of “small entity” does not include individuals, but classifies a not-for-
3 profit enterprise as a “small organization” if it is independently owned and operated and
4 not dominant in its field. 5 U.S.C. 601(4). The proposed rule would affect political party
5 committees, including national, State, district, and local party committees, and other
6 organizations of a political party, which are not independently owned and operated
7 because they are not financed and controlled by a small identifiable group of individuals.
8 Political party committees are financed by contributions from a large number of
9 individuals and are controlled by the political party officials and political party
10 employees and volunteers. In addition, the political party committees and organizations
11 representing the Democratic and Republican parties have a major controlling influence
12 within the national, State, and local political arenas and are thus dominant in their field.
13 District and local party committees, and other organizations of a political party that are
14 considered affiliated with the State committees need not be considered separately. To the
15 extent that any political party committees might be considered “small organizations,” the
16 number that would be affected by this proposed rule is not substantial. Therefore, the
17 attached proposed rule, if promulgated, would not have a significant economic impact on
18 a substantial number of small entities.

19 **List of Subjects**

20 11 CFR Part 106

- 21 Campaign funds.
- 22 Political committees and parties.
- 23 Reporting and recordkeeping requirements.

24

1 **PART 106 – ALLOCATIONS OF CANDIDATE AND COMMITTEE**
2 **ACTIVITIES**

3 For the reasons set out in the preamble, the Federal Election Commission
4 proposes to amend Subchapter A of Chapter I of Title 11 of the Code of Federal
5 Regulations as follows:

6 1. The authority citation for Part 106 would continue to read as follows:

7 **Authority:** 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

8 2. Section 106.8 would be revised to read as follows:

9 **§ 106.8 Attribution of expenses for political party committee hybrid**
10 **communications.**

11 (a) Scope and definition.

12 (1) This section applies to any public communication, as defined in 11 CFR
13 100.26, made by a national, State, district, or local committee or
14 organization of a political party, that --

15 **Paragraph (a)(1)(i) and (ii) – Alternative 1 (Candidate References)**

16 (i) Refers to either:

17 (A) Only one clearly identified Federal candidate; or

18 (B) Two or more clearly identified Federal candidates for the
19 same Federal office, only one of whom is the candidate of
20 the political party making the public communication;

21 (ii) Does not refer to any other clearly identified Federal or non-
22 Federal candidate;

1 **Paragraph (a)(1)(i) and (ii) – Alternative 2 (Multiple Federal**
2 **Candidate Reference)**

- 3 (i) Refers to either:
- 4 (A) Only one clearly identified Federal candidate;
- 5 (B) Two or more clearly identified Federal candidates for the
- 6 same Federal office, only one of whom is the candidate of
- 7 the political party making the public communication; or
- 8 (C) Two or more clearly identified Federal candidates for
- 9 different Federal offices, all of whom are candidates of the
- 10 political party making the public communication.
- 11 (ii) Does not refer to any other clearly identified Federal or non-
- 12 Federal candidate;

13 **Paragraph (a)(1)(iii) – Alternative 1 (Generic Party Reference)**

- 14 (iii) Generically refers to other Federal or non-Federal candidates of a
- 15 political party by using the name or nickname of the political party,
- 16 but without clearly identifying the candidates;

17 **Paragraph (a)(1)(iii) – Alternative 2 (Generic Party Reference)**

- 18 (iii) Generically refers to other Federal or non-Federal candidates
- 19 without clearly identifying the candidates;
- 20 without clearly identifying the candidates;
- 21 (iv) Does not solicit a contribution, donation, or any other funds from
- 22 any person; and
- 23 (v) Is not exempt from the definition of contribution or expenditure
- 24 under 11 CFR part 100, subpart C or E.

1 **Paragraph (a)(2) – Alternative 1 (Certain Hybrid Communications**
2 **Excluded)**

3 (2) This section does not apply to a public communication that refers to two
4 or more clearly identified Federal candidates for different Federal offices,
5 or one or more clearly identified non-Federal candidates, and generically
6 refers to other Federal or non-Federal candidates as described in paragraph
7 (a)(1)(iii) of this section. Disbursements for such public communications
8 must be attributed solely to the clearly identified candidates under 11 CFR
9 106.1(a).

10 **Paragraph (a)(2) – Alternative 2 (Certain Hybrid Communications**
11 **Excluded)**

12 (2) This section does not apply to a public communication that refers to two
13 or more clearly identified Federal candidates for different Federal offices
14 who are not candidates of the political party making the communication,
15 or to one or more clearly identified non-Federal candidates, and
16 generically refers to other Federal or non-Federal candidates as described
17 in paragraph (a)(1)(iii) of this section. Disbursements for such public
18 communications must be attributed solely to the clearly identified
19 candidates under 11 CFR 106.1(a).

20 (3) This section does not apply to independent expenditures, as defined in 11
21 CFR 100.16, for a public communication described in paragraph (a)(1) of
22 this section. Under 11 CFR 104.4 and 104.3(b)(3)(vii), the entire amount
23 of such independent expenditures must be reported as either in support of,

1 or in opposition to, a particular candidate, without regard to the generic
2 reference to other candidates. Under 11 CFR part 300, such independent
3 expenditures must be made entirely with Federal funds.

4 **Paragraph (b) – Alternative 1 (Fixed Percentage (25% or 50% or 75%) Attribution)**

5 (b) Attribution. Each disbursement for a public communication described in
6 paragraph (a) of this section must be made entirely with Federal funds and must be
7 attributed as follows:

8 (1) 25 or 50 or 75 percent of the disbursement is attributed to the Federal
9 candidate of the political party making the public communication who is
10 either:

- 11 (i) Clearly identified in the public communication; or
- 12 (ii) A candidate for the same Federal office as the only Federal
13 candidate clearly identified in the public communication.

14 (2) The portion of each disbursement not attributed to the Federal candidate
15 described in paragraph (b)(1) of this section is not attributable to any other
16 Federal or non-Federal candidate.

17 **Paragraph (b) – Alternative 2 (Fixed Percentage (100%) Attribution)**

18 (b) Attribution. The entire amount of each disbursement for a public communication
19 described in paragraph (a) of this section must be attributed to the Federal candidate of
20 the political party making the public communication who is either clearly identified in the
21 public communication or a candidate for the same Federal office as the only Federal
22 candidate clearly identified in the public communication, and must be made entirely with
23 Federal funds.

1 **Paragraph (b) – Alternative 3 (The Greater of a Fixed Percentage or a Space or**
2 **Time Attribution)**

3 (b) Attribution. Each disbursement for a public communication described in
4 paragraph (a) of this section must be made entirely with Federal funds and must be
5 attributed as follows:

6 (1) Each disbursement must be attributed to the Federal candidate of the
7 political party making the public communication who is either clearly
8 identified in the public communication or a candidate for the same Federal
9 office as the only Federal candidate clearly identified in the public
10 communication, based on the proportion of the space or time, or number
11 of questions or statements, devoted to all clearly identified Federal
12 candidates as compared to the total space or time, or number of questions
13 or statements, devoted to all clearly identified Federal candidates and all
14 generic references to other candidates, but at least 25 or 50 or 75 percent
15 of each disbursement must be attributed to the Federal candidate of the
16 political party making the public communication; and

17 (2) The portion of each disbursement not attributed to the Federal candidate
18 described in paragraph (b)(1) of this section is not attributable to any other
19 Federal or non-Federal candidate.

20 (c) Treatment of disbursements. The disbursement described in paragraph (b)(1) of
21 this section may be one or a combination of the following:

22 (1) An in-kind contribution, subject to the limitations of 11 CFR 110.1 or
23 110.2;

